

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs December 5, 2006

STATE OF TENNESSEE v. JOHN LEWIS CAREY

Appeal from the Criminal Court for Sumner County
No. 394-2004 Jane Wheatcraft, Judge

No. M2006-01124-CCA-R3-CD - Filed January 24, 2007

The Appellant, John Lewis Carey, appeals the judgment of the Sumner County Criminal Court revoking his community corrections sentence. Carey pled guilty to Class C felony possession of cocaine with intent to sell and received a ten-year sentence, as a Range II offender, to be served in the Community Corrections Program. In December 2005, a warrant was issued alleging that Carey had violated the terms of his behavioral agreement by missing three office visits with his case officer, missing two home visits, and not providing a current address. Following a hearing, the trial court ordered revocation of the sentence. On appeal, Carey, although admitting that he did in fact violate the behavioral agreement, argues that the trial court “failed to exercise conscientious and intelligent judgment” in finding that a violation had occurred. Following review, the judgment of the trial court is affirmed.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed

DAVID G. HAYES, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and J.C. McLIN, JJ., joined.

David A. Doyle, District Public Defender, Gallatin, Tennessee, for the Appellant, John Lewis Carey.

Robert E. Cooper, Jr., Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; Lawrence Ray Whitley, District Attorney General; and William Lamberth, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

In May 2004, the Appellant was indicted by a Sumner County grand jury for: (1) possession of .5 grams or more of cocaine, with the intent to sell or deliver, a Class B felony; (2) tampering with evidence; and (3) public intoxication. On October 25, 2004, the Appellant pled guilty to possession of less than .5 grams of cocaine with the intent to sell, a Class C felony, and the remaining charges were dismissed. Pursuant to the plea agreement, he received a ten-year community corrections

sentence as a Range II offender. On October 28, 2004, just three days later, the Appellant violated his sentence by testing positive for cocaine. He was subsequently ordered to serve one year in the county jail and was then returned to the community corrections program. The Appellant was again found to be in violation of his community corrections agreement based upon a failure to report and to provide a correct address. He served ninety days in jail, being released back into the program on November 3, 2005.

The Appellant met with his community corrections case officer on November 7, 2005. He informed his case officer that he would be staying with his sister¹ at 739 North Water Avenue, Apt. F-17. The case officer explained the terms of house arrest to the Appellant and set up scheduled office visits, as well as informed the Appellant that periodic home visits would be conducted at the address given. The Appellant subsequently missed three of the scheduled office visits. According to a community corrections surveillance officer, the Appellant was at the address provided on November 7th when the initial home visit occurred. However, when the officer returned for follow-up visits on November 16th and November 28th, the Appellant was not present.

On December 1, 2005, a violation warrant was issued based upon the fact that the Appellant had “missed the last three office visits and two home visits” and had “not provided [the] case officer with a current valid address.” A hearing was held on April 10, 2006, at which the Appellant’s case officer, a community corrections surveillance officer, the Appellant, and the Appellant’s girlfriend testified. The Appellant acknowledged that he missed the scheduled office visits and that he was no longer living at his sister’s residence. According to the Appellant, he left the residence after only a few days because drugs were present in the home. He stated that he had wandered around the streets with nowhere to go and slept in parked vehicles because all the shelters were full. He testified that he did not report this fact to his case officer because he knew he had no valid home address and was afraid he would be violated.

Following the presentation of the evidence, the trial court found that the Appellant was in violation of his community corrections agreement, revoked his sentence, and ordered the Appellant to serve the remainder of his ten-year sentence in confinement. This timely appeal followed.

Analysis

On appeal, the Appellant contends that the trial court “failed to exercise conscientious and intelligent judgment in finding by a preponderance of the evidence that the [Appellant] violated the terms and conditions of community corrections” He asserts that to revoke his sentence under the instant circumstances punishes him for being homeless, which is “contrary to both the spirit and the meaning of rehabilitation.” However, the Appellant does not dispute that he did in fact violate

¹There was confusion in the record as to whether the female living at the address was the Appellant’s sister or his cousin. The case officer testified that it was the Appellant’s sister, Cassie S. Ewing. However, the Appellant testified that he was staying at the address with his cousin.

the behavioral agreement by failing to attend scheduled office visits, failing to be present for home visits, and by failing to provide a valid address to his case officer.

If the trial court finds by a preponderance of the evidence that a defendant has violated the conditions of his behavioral agreement, a trial court retains the authority to revoke the defendant's placement in a community corrections program and cause execution of the original judgment as it was entered. T.C.A. § 40-36-106(e)(4) (2003). This court reviews revocation under an abuse of discretion standard. *State v. Stubblefield*, 953 S.W.2d 223, 226 (Tenn. Crim. App. 1997) (citing *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991)). Discretion is abused only if the record contains no substantial evidence to support the conclusion of the trial court that a violation has occurred. *State v. Gregory*, 946 S.W.2d 829, 832 (Tenn. Crim. App. 1997). This means that the evidence need only show that the trial judge has exercised “conscientious and intelligent judgment in making the decision rather than acting arbitrarily.” *State v. Leach*, 914 S.W.2d 104, 106 (Tenn. Crim. App. 1995) (citing *Stamps v. State*, 614 S.W.2d 71, 73 (Tenn. Crim. App. 1980)). Thus, in reviewing the trial court’s action, it is our obligation to examine the record and determine whether the trial court has exercised a conscientious judgment.

The Appellant’s argument on appeal is misplaced. Assuming the truth of the Appellant’s testimony that he was in fact homeless during this period, we would acknowledge that his situation is certainly not ideal, nonetheless, his lack of a residence cannot excuse his failure to comply with the reporting requirements of the behavioral agreement. The Appellant bears the responsibility of complying with the terms of the agreement. As the State pointed out during cross-examination, if the Appellant had contacted his case officer, arrangements could likely have been made to accommodate the problem if, in fact, the problem existed. As noted by the trial court in its findings, the Appellant has been given numerous chances at rehabilitation, this being the third time he has violated the conditions of his behavioral agreement.

We conclude that the proof at the revocation hearing clearly established by a preponderance of the evidence that the Appellant violated the terms of behavioral agreement by missing scheduled office visits, missing two home visits, and by failing to provide a current valid address to his case officer. The Appellant’s case officer testified that the Appellant failed to attend his scheduled meetings and that the only address provided by the Appellant was on North Water Avenue. The surveillance officer testified that he visited that address on two separate occasions, on November 16th and 28th, and that the Appellant, whose agreement provided for house arrest, was not present at the address. As noted, the Appellant himself admitted that he failed to attend the scheduled meetings and was no longer staying at the North Water Avenue address. Thus, we cannot conclude that the trial court abused its discretion in revoking the Appellant’s community corrections sentence.

CONCLUSION

Based upon the foregoing, the Sumner County Circuit Court’s revocation of the community corrections sentence is affirmed.

DAVID G. HAYES, JUDGE